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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues	)	MM Docket No. 92-259

REPLY COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these Comments in response to the Notice of Proposed Rule Making, ("NPRM"), released by the Commission in this docket on November 5, 1992. In this NPRM, the Commission is seeking comments on rules to implement the new "must-carry" and "retransmission consent" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"). Sections 4 (47 U.S.C. § 614) and 5 (47 U.S.C. § 615) of the Act mandate cable carriage of designated commercial and noncommercial stations. Section 6 (47 U.S.C. § 325) of the Act gives broadcasting stations the right to grant cable systems and multichannel distributors the right to retransmit their broadcast signals pursuant to negotiated agreements.

NTCA is a national association of approximately 500 small and rural local exchange carriers ("LECs") providing telecommunications services to interexchange carriers ("IXCs") and subscribers across rural America. Approximately 150 of

NTCA's members operate small cable television systems in their telephone service area. Most of them provide service under the rural exemption in 47 C.F.R. § 63.58.

NTCA members deployed most of these systems at the request of local franchising authorities or rural communities which otherwise would not have received cable service at all or would have been the last to do so but for the provision of the service by the telephone company. Unlike the large systems that operate in large metropolitan areas or that may have small operations in rural areas, these NTCA member systems are always small and operate the same way the telephone company is operated; that is with the customer and customer service in mind and as the first priority. NTCA urges the Commission to adopt policies to reduce regulatory burdens on these systems and to take measures to assure that the systems are not saddled with regulations that diminish the level of service to subscribers (who are the owners of the systems in the case of the cooperatives) or that make the provision of CATV service to rural areas uneconomic for the systems.

DISCUSSION

I. THE COMMISSION SHOULD ADOPT AN EXPRESSED POLICY INDICATING THAT IT WILL GRANT LIBERAL WAIVERS OF ITS MUST-CARRY RULES TO SMALL CATV SYSTEMS.

NTCA does not quarrel with the Commission's conclusion with respect to congressional intent. However, In view of the ongoing challenge to the constitutionality of these provisions and of the prior invalidation of must-carry rules, NTCA urges the Commission to adopt a liberal waiver policy to mitigate the harsh and potentially disruptive effect small CATV systems will experience, whether or not the must-carry provisions of the Act are declared unconstitutional. NTCA will not repeat the constitutional issues before the court in Turner Broadcasting Systems et. al. v. F.C.C. et. al., Consolidated Case Nos. 92-2247, 92-2292, 92-2492, 92-2495 and 92-2550 (D.C. Cir., December 8, 1992) but supports the efforts of those raising constitutional arguments.[1]

The Commission believes that the Congressional intent of the must-carry and channel positioning provisions of the Act is "to protect the system of free, over-the-air television broadcasting and to promote competition in local markets." NPRM, ¶ 4. NTCA does not argue with this conclusion but requests that the Commission consider the unique position of small CATV systems operated under the rural exemption in its attempt to comply with the legislative intent expressed in the challenged provisions of the Act.

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[1] In the Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4, which the Commission terminates in this proceeding, NTCA stated that no public interest benefits would result if the Commission amended its rules to require must-carry of small CATV systems with limited channel capacity. NTCA also pointed out that the rulings in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir., 1985), cert. denied, 476 U.S. 1032 (1986) and Century Communications Corp v. FCC, 835 F.2d 292 (D.C. Cir., 1987), clarified, 837 F.2d 517, cert. denied, 486 U.S. 1032 (1988) required that the Commission meet the heavy burden of demonstrating the existence of a threat to local broadcasting and a showing that the must-carry rules alleviated that threat. See, NTCA Reply Comments, MM Docket No. 90-4, October 25, 1991.

The Commission already has in place rules that allow it to "waive any provision of the rules relating to cable television systems . . . ." 47 C.F.R. § 7(a).[2] In keeping with this general rule, NTCA requests that the Commission announce a general policy indicating that it will grant small CATV systems operating under the rural exemption liberal waiver from the must-carry and retransmission consent rules.

A liberal waiver policy would go a long way to ameliorate the harsh effects of Section 614(b)(1)(B) which requires a small cable system with more than 300 subscribers and more than 12 usable activated channels to carry the signals of local commercial television stations on up to one-third of its usable activated channels. The unfortunate 12 channel ceiling above which must-carry applies will have a particularly harsh effect on small systems. The requirement to carry up to one-third leaves the typical small operator 16 channel system with 11 channels for its own programming.[3] The obligation to carry 5 free channels is likely to have an adverse economic impact for a system this size and for its cable ratepayers. In addition, the effect is particularly egregious and contrary to the goal of localism and

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[2] The Commission asks whether it should allow parties to file under Section 614(h)(1)(C) petitions for special relief utilizing 47 C.F.R. § 76.7. NPRM, ¶ 19. NTCA endorses this proposal also.

[3] A congressional finding states "the averaged number of basic channels has increased from about 24 to 30" since 1986. Pub. L. No. 102-385, 106 Stat. 1460 (1992). No doubt this average includes large systems, whereas 16 channels can be typical for a small system.

competition in isolated rural areas where some or even all of the pool of eligible must-carry stations are miles away and have no coverage of the news or other matters pertaining to the viewing community. Moreover, small systems, like large ones will have to confront the troublesome issues associated with their location in multiple markets; they will also be faced with the consequences of the Commission's determination of the location of the system for purposes of must-carry. NTCA urges the Commission to apply a liberal waiver policy to allow small systems relief from its rules and definitions of what a "local commercial television" station is so that small systems are not saddled with burdensome measures designed for situations that are totally different from that of the typical small system operated under the rural exemption. The Commission should adopt rules that are flexible enough to allow small systems that are located in more than one market to use customer and franchise authority input in determining which commercial stations to carry without penalty.[4]

II. RETRANSMISSION CONSENT COULD BE FINANCIALLY DEVASTATING TO SMALL RURAL CABLE SYSTEMS.

The Commission should also expressly state that it will allow liberal waivers of the retransmission rules utilizing its procedures in 47 C.F.R. § 76.7(a). Retransmission consent is particularly onerous for small systems like NTCA's member systems. These systems are often marginally profitable. Many

4 Many NTCA member systems fall under the observation the Commission makes that many "stations (are) located hundreds of miles away from the cable system." NPRM at 20.

systems are non-profit cooperatives, and retransmission consent fees would simply add another regulatory and financial burden without bringing consumer benefits. In addition, the necessity to negotiate with firms that have virtually unlimited resources in comparison to those available to small systems, places these small systems at a disadvantage. NTCA agrees with the comments of the Community Antenna Television Association, Inc. that the costs of negotiations for the smaller systems are higher since transactionally there are far more small systems on the periphery of the market in most cases than there are large central systems. As a result, rural systems and their subscribers wind up paying a significantly higher proportion of their revenues than others in the market. The ultimate loser in this situation is the consumer. NTCA urges the Commission to take measures to protect the public interest by adopting a liberal waiver policy with respect to its rules governing retransmission consent. In addition, the Commission should consider a rule that allows small systems to be exempt from the requirement to pay retransmission carriage fees if a heavy rate burden is shown.

NTCA agrees with New England Telephone and Telegraph Company and New York Telephone Company ("NYNEX") that the Commission should "make clear in the regulations it prescribes that the 'must-carry' and 'retransmission consent' rules do not apply to video dialtone providers." NYNEX at page 1. Telephone companies providing video dialtone services are simply acting in a third party capacity and should be exempt.

CONCLUSION

For the above stated reasons, NTCA urges the Commission to adopt rules which incorporate liberal waiver provisions and reduce regulatory burdens on small CATV systems operating under the rural exemption.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

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